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Filing date: **06/10/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206998
Party	Plaintiff Board of Regents, The University of Texas System
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Submission	Motion for Summary Judgment
Filer's Name	Tyson D. Smith
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Signature	/TDS/
Date	06/10/2013
Attachments	msj-1.pdf(1887826 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re Serial No. 85/462,880	§	
Filed: November 2, 2011	§	
Mark: ALLOGRAFT RESOURCES and	§	
Design	§	
Published: August 28, 2012	§	
	§	
Board of Regents,	§	
The University of Texas System,	§	
	§	Opposition No. 91206998
Opposer	§	
	§	
v.	§	
	§	
Kelly Stutes,	§	
	§	
Applicant.	§	

OPPOSER’S MOTION FOR SUMMARY JUDGMENT

Opposer Board of Regents, The University of Texas System (“Opposer”)¹ brings this Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 and TBMP § 528.

I. INTRODUCTION

For several years, UTHSCSA has continuously and extensively used the mark ALLOGRAFT RESOURCES and the ALLOGRAFT RESOURCES and Design mark (“ALLOGRAFT RESOURCES Design Mark,” shown directly below) (collectively, the “ALLOGRAFT RESOURCES Marks”) in connection with human bone and tissue and related tissue banking services.

¹ Opposer is a Texas state board established for the purpose of governing The University of Texas System (“UT System”), a system of highly regarded institutions of higher education, including The University of Texas Health Science Center at San Antonio (“UTHSCSA”). UTHSCSA and the UT System are hereinafter collectively referred to as “Opposer.”



Applicant Kelly Stutes (“Applicant”) seeks to register the nearly-identical mark ALLOGRAFT RESOURCES and Design (shown directly below) (“Applicant’s Mark”) for “Human allograft bone and tissue” in Class 5.



Applicant admits that Applicant’s Mark is confusingly similar to Opposer’s ALLOGRAFT RESOURCES Marks. Based on this admission, Opposer is entitled to summary judgment on its likelihood of confusion claim.

II. FACTUAL BACKGROUND

Since at least 2005, Opposer has continuously and extensively used the mark ALLOGRAFT RESOURCES in connection with human bone and tissue graft donation, procurement, and distribution, and in connection with related tissue bank services. *See* Declaration of Gary J. Sertich (referred to hereinafter as “Sertich Declaration”), Exhibit A hereto, at ¶ 4. Since at least as early as October 2010, UTHSCSA has continuously used the ALLOGRAFT RESOURCES and Design Mark in connection with UTHSCSA’s human bone and tissue and related tissue banking services. *Id.* at ¶ 5.

Applicant was an employee of UTHSCSA from April 1994 to August 2011, and worked during this time in various positions, including UTHSCSA’s Allograft Resources division. *Id.* at ¶ 6; *see also* Opposer’s First Set of Requests for Admission to Applicant (“Opposer’s Requests for Admission”), Request Nos. 11 and 12 (deemed admitted, as explained below), Exhibit B

hereto. While Applicant was employed by UTHSCSA, Opposer adopted and began using its ALLOGRAFT RESOURCES Marks. Sertich Declaration, at ¶ 8; *see also* Opposer's Requests for Admission, Request Nos. 13, 14, and 15 (deemed admitted, as explained below). Shortly after Applicant was terminated by UTHSCSA in August 2011, *see* Sertich Declaration, at ¶ 7, and well after Opposer had begun using the ALLOGRAFT RESOURCES Marks, Applicant applied on November 2, 2011 to register Applicant's Mark for "Human allograft bone and tissue" on an intent-to-use basis. Applicant, through his attorney Mark A. Kammer, declared in the Application (as defined in paragraph 7 of the Notice of Opposition) that "to the best of his... knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." *See* Exhibit C. However, through his 17-year employment with Opposer, Applicant was fully aware of Opposer's use of the ALLOGRAFT RESOURCES Marks prior to applying to register Applicant's Mark. *See* Opposer's Requests for Admission, Request Nos. 1-4 and 11-15 (deemed admitted, as explained below). Opposer timely opposed Applicant's Application, alleging that Applicant's proposed use of Applicant's Mark is likely to cause confusion with Opposer's ALLOGRAFT RESOURCES Marks.

On February 21, 2013, Opposer served Opposer's Requests for Admission (attached pursuant to TBMP § 528.05(c) and 37 CFR § 2.127(e)(2) as Exhibit B hereto) and other written discovery requests on Applicant. *See* Declaration of Tyson Smith (referred to hereinafter as "Smith Declaration"), Exhibit D hereto, at ¶ 2, Ex. 1. Applicant failed to respond thereto, thus making a number of admissions. *See id.* at ¶ 3-5. Applicant's responses were due March 23, 2013 (the requests were served by email, *see* Smith Declaration, at ¶ 2, Ex. 1), and would have

had to be served by March 25, 2013 given that March 23 fell on a Saturday. After Applicant failed to respond to Opposer's Requests for Admission and other written discovery requests, counsel for Opposer called and left a voicemail with Applicant's attorney on April 9, 2013, and sent Applicant's attorney an email on April 11, 2013, inquiring about Applicant's intentions with regard to this opposition proceeding. *See id.* at ¶ 4, Ex. 2. Applicant's attorney finally responded on April 23, 2013, stating that he and Applicant would be "putting together a proposal to settle the dispute without the need to go forward further with the Opposition," and promising to have the basic proposed terms of settlement to Opposer's counsel by the end of the day Tuesday, April 30, 2013. *Id.* at ¶ 5, Ex. 3. Applicant's counsel has not provided these promised proposed terms of settlement to Opposer's counsel, and has not otherwise communicated with Opposer's counsel since April 23, 2013. *Id.* Accordingly, Opposer's Requests for Admission are deemed admitted. FED. R. CIV. P. 36; TBMP § 411.03. Among the deemed admissions are the following facts:

1. Applicant was aware of Opposer's ALLOGRAFT RESOURCES Marks prior to his adoption of Applicant's Mark (Request No. 1);
2. Applicant was aware of Opposer's ALLOGRAFT RESOURCES Marks prior to his use of Applicant's Mark (Request No. 2);
3. Applicant was aware of Opposer's ownership and use of the ALLOGRAFT RESOURCES Marks prior to filing trademark Application Serial No. 85/462,880 with the United States Patent and Trademark Office (Request Nos. 3 and 4);
4. Applicant never received permission from Opposer to use Applicant's Mark or the ALLOGRAFT RESOURCES Marks (Request No. 10);
5. Applicant was employed by UTHSCSA from April 1994 to August 2011 (Request No. 11);
6. Applicant worked in Opposer's Allograft Resources division while employed by UTHSCSA (Request No. 12);
7. The ALLOGRAFT RESOURCES Marks were first used while Applicant was employed by UTHSCSA (Request No. 13);

8. The ALLOGRAFT RESOURCES Marks were created or developed while Applicant was an employee of UTHSCSA (Request No. 14);
9. The ALLOGRAFT RESOURCES Design Mark was created, developed, or designed while Applicant was an employee of UTHSCSA (Request No. 15);
10. Applicant did not create, develop, or design the ALLOGRAFT RESOURCES Marks (Request No. 16);
11. Applicant was not involved in the creation, development, or design of the ALLOGRAFT RESOURCES Design Mark (Request No. 17);
12. Opposer is the owner of the ALLOGRAFT RESOURCES Design Mark (Request No. 26);
13. Opposer is the owner of the ALLOGRAFT RESOURCES Marks (Request No. 27);
14. Opposer used the ALLOGRAFT RESOURCES Marks before Applicant used Applicant's Marks (Request No. 28);
15. Applicant's Mark is confusingly similar to the ALLOGRAFT RESOURCES Design Mark (Request No. 29); and
16. Applicant's Mark is confusingly similar to the ALLOGRAFT RESOURCES Marks (Request No. 30).

III. LEGAL STANDARDS

A. Summary Judgment

Summary judgment benefits the judicial system because it is a “method of disposition designed to secure the just, speedy and inexpensive determination of every action.” *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987). Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). A factual dispute is genuine only if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *Lloyd's Food Prods., Inc. v. Eli's Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993).

B. Likelihood of Confusion

Whether a likelihood of confusion exists is a question of law, based on underlying factual determinations. It is determined on a case-specific basis, applying the factors set out in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *Recot, Inc. v. Becton*, 214 F.3d 1322, 1326 (Fed. Cir. 2000).² “[T]he Board need not discuss every factor, but may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001); *see also Venture Out Props. LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1891 (TTAB 2007) (granting summary judgment for Opposer on its likelihood of confusion claim, focusing on “the appearance of the marks, the related nature of the services, and the similarity of trade channels”). Any doubts whether confusion is likely are resolved against the newcomer. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002).

IV. ARGUMENT

The marks at issue are nearly identical, and Applicant has admitted that Applicant’s Mark is confusingly similar to Opposer’s ALLOGRAFT RESOURCES Marks. Opposer owns and uses the mark ALLOGRAFT RESOURCES and the ALLOGRAFT RESOURCES Design Mark shown here:

² The *DuPont* factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing; (5) the fame of the prior mark (sales, advertising, length of use); (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used (house mark, “family” mark, product mark); (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, *i.e.*, whether *de minimis* or substantial; and (13) any other established fact probative of the effect of use. *Recot*, 214 F.3d at 1326-27.



Applicant's Mark, shown directly below, contains the identical elements featured in Opposer's ALLOGRAFT RESOURCES Design Mark, and conveys the same commercial impression as Opposer's ALLOGRAFT RESOURCES Design Mark.



Further, Applicant's Mark is indistinguishable from Opposer's ALLOGRAFT RESOURCES Design Mark, except that Applicant's Mark merely features the distinctive square design in Opposer's ALLOGRAFT RESOURCES Design Mark to the left of, rather than below, the words ALLOGRAFT RESOURCES, and the word "RESOURCES" in Applicant's Mark appears at the bottom-left, rather than the bottom-right, of the word "ALLOGRAFT." The colors featured in Applicant's Mark are also identical or highly similar to the colors used in Opposer's ALLOGRAFT RESOURCES Design Mark. Because the marks are nearly identical and thus, as Applicant admits, confusingly similar, the first *DuPont* factor "weighs heavily against applicant." *In re Martins' Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566 (Fed. Cir. 1984).

Additionally, the services in the Application ("Human allograft bone and tissue") are identical or highly similar to services in connection with which Opposer uses its ALLOGRAFT RESOURCES Marks (human bone and tissue and related tissue banking services).

Furthermore, because there are no trade channel restrictions in Applicant's intent-to-use application, it is presumed that Applicant's services are sold through normal channels of trade for such services. *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir.

1990); *Nike, Inc. v. WNBA Enters., LLC*, 85 USPQ2d 1187, 1195 (TTAB 2007). Furthermore, because the services described in the Application and those offered under Opposer's ALLOGRAFT RESOURCES Marks are identical, the channels of trade and classes of purchasers are presumed to be the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade."); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Thus, the market interface between the parties is also great (*du Pont* factor ten).

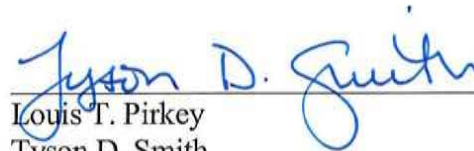
As in *Han Beauty, Inc.* and *Venture Out Props. LLC*, the similarity of the marks, relatedness of the services, and similarity in channels of trade are dispositive factors in the *DuPont* analysis. Thus, the uncontroverted facts established here, including through Applicant's admissions, overwhelmingly support entry of summary judgment that confusion is likely. Opposer is entitled to judgment as a matter of law on its likelihood of confusion claim, and the Application should be denied.

V. CONCLUSION

The uncontested facts and Applicant's admissions in this case establish as a matter of law that Applicant's registration and proposed use of Applicant's Mark is likely to cause confusion with Opposer's ALLOGRAFT RESOURCES Marks. Opposer therefore requests that the Board grant summary judgment sustaining the Opposition based on Opposer's likelihood of confusion claim.

Respectfully submitted,

Date: June 10, 2013



Louis T. Pirkey

Tyson D. Smith

PIRKEY BARBER PLLC

600 Congress Avenue, Suite 2120

Austin, Texas 78701

(512) 322-5200

ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by First Class mail, postage prepaid, on June 10, 2013, on Applicant's attorney of record:

Mark A. Kammer
Kammer Browning PLLC
7700 Broadway
Suite 202
San Antonio, Texas 78209




EXHIBIT A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re Serial No. 85/462,880	§	
Filed: November 2, 2011	§	
Mark: ALLOGRAFT RESOURCES and	§	
Design	§	
Published: August 28, 2012	§	
	§	
Board of Regents,	§	
The University of Texas System,	§	
	§	Opposition No. 91206998
Opposer	§	
	§	
v.	§	
	§	
Kelly Stutes,	§	
	§	
Applicant.	§	

**DECLARATION OF GARY SERTICH IN SUPPORT OF OPPOSER'S
MOTION FOR SUMMARY JUDGMENT**

I, Gary J. Sertich, declare as follows:

1. I make this declaration based on my own personal knowledge or based on business records made available to me during my career with The University of Texas Health Science Center at San Antonio (UTHSCSA), and could and would competently testify as to the matters set forth below if called upon to do so.

2. I am currently a Senior Attorney in the Office of Legal Affairs at UTHSCSA, where I have worked since 1999.

3. Opposer Board of Regents, The University of Texas System is a Texas state board established for the purpose of governing The University of Texas System ("UT System"), a system of highly regarded institutions of higher education, including UTHSCSA. UTHSCSA and the UT System are hereinafter collectively referred to as "Opposer."

4. Since at least 2005, Opposer has continuously and extensively used the mark ALLOGRAFT RESOURCES in connection with human bone and tissue graft donation, procurement, and distribution, and in connection with related tissue bank services.

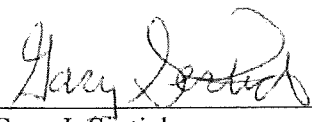
5. Since at least as early as October 2010, UTHSCSA has continuously used the ALLOGRAFT RESOURCES and Design Mark (defined in paragraph 4 of Opposer's Notice of Opposition) in connection with UTHSCSA's human bone and tissue and related tissue banking services.

6. Applicant Kelly Stutes ("Applicant") was an employee of UTHSCSA from April 1994 to August 2011, and worked during this time in various positions including UTHSCSA's Allograft Resources division.

7. Applicant's employment with UTHSCSA was terminated in August 2011.

8. While Applicant was employed by UTHSCSA, Opposer adopted and began using its ALLOGRAFT RESOURCES Marks (defined in paragraph 4 of the Notice of Opposition in this proceeding).

I declare under penalty of perjury that the foregoing is true and correct. Executed in Austin, Texas on June 7, 2013.



Gary J. Sertich

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Board of Regents,	§	
The University of Texas System,	§	
	§	Opposition No. 91206998
Opposer,	§	
	§	
v.	§	
	§	
Kelly Stutes,	§	
	§	
Applicant.	§	

OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION TO APPLICANT

Opposer Board of Regents, The University of Texas System ("Opposer") serves the following requests for admission under Fed. R. Civ. P. 36 and Rules 2.116 and 2.120 of the Trademark Rules of Practice.

DEFINITIONS AND INSTRUCTIONS

The definitions and instructions forming part of Opposer's First Set of Interrogatories to Applicant, served concurrently herewith, are hereby incorporated by reference.

REQUESTS FOR ADMISSION

REQUEST NO. 1

Admit that you were aware of Opposer's ALLOGRAFT RESOURCES Marks prior to your adoption of Applicant's Mark.

REQUEST NO. 2

Admit that you were aware of Opposer's ALLOGRAFT RESOURCES Marks prior to your use of Applicant's Mark.

REQUEST NO. 3

Admit that you were aware of Opposer's ownership of the ALLOGRAFT RESOURCES Marks prior to filing trademark Application Serial No. 85/462,880 with the United States Patent and Trademark Office ("USTPO").

REQUEST NO. 4

Admit that you were aware of Opposer's use of the ALLOGRAFT RESOURCES Marks prior to filing trademark Application Serial No. 85/462,880 with the USTPO.

REQUEST NO. 5

Admit that you were aware of Opposer's ownership of the ALLOGRAFT RESOURCES Marks prior to filing trademark Application Serial No. 85/405,060 with the USPTO.

REQUEST NO. 6

Admit that you were aware of Opposer's use of the ALLOGRAFT RESOURCES Marks prior to filing trademark Application Serial No. 85/405,060 with the USPTO.

REQUEST NO. 7

Admit that you do not own, in whole or in part, the copyright in the ALLOGRAFT RESOURCES Design Mark.

REQUEST NO. 8

Admit that Opposer owns the copyright in the ALLOGRAFT RESOURCES Design Mark.

REQUEST NO. 9

Admit that Opposer's ALLOGRAFT RESOURCES Design Mark was designed for UTHSCSA at least in part by an outside media company.

REQUEST NO. 10

Admit that you never received permission from Opposer to use Applicant's Mark or the ALLOGRAFT RESOURCES Marks.

REQUEST NO. 11

Admit that you were employed by UTHSCSA from April 1994 to August 2011.

REQUEST NO. 12

Admit that while you were employed by UTHSCSA, you worked in Opposer's Allograft Resources division.

REQUEST NO. 13

Admit that the ALLOGRAFT RESOURCES Marks were first used while you were employed by UTHSCSA.

REQUEST NO. 14

Admit that the ALLOGRAFT RESOURCES Mark was created or developed while you were an employee of UTHSCSA.

REQUEST NO. 15

Admit that the ALLOGRAFT RESOURCES Design Mark was created, developed, or designed while you were an employee of UTHSCSA.

REQUEST NO. 16

Admit that you did not create, develop, or design the ALLOGRAFT RESOURCES Marks.

REQUEST NO. 17

Admit that you were not involved in the creation, development, or design of the ALLOGRAFT RESOURCES Design Mark.

REQUEST NO. 18

Admit that the ALLOGRAFT RESOURCES Mark was developed or created using the facilities or resources of UTHSCSA.

REQUEST NO. 19

Admit that the ALLOGRAFT RESOURCES Design Mark was created, developed, or designed using the facilities or resources of UTHSCSA.

REQUEST NO. 20

Admit that the ALLOGRAFT RESOURCES Mark was developed or created using UTHSCSA funds.

REQUEST NO. 21

Admit that the ALLOGRAFT RESOURCES Design Mark was created, developed, or designed using UTHSCSA funds.

REQUEST NO. 22

Admit that the ALLOGRAFT RESOURCES Mark was created or developed resulting from activities performed on UTHSCSA time.

REQUEST NO. 23

Admit that the ALLOGRAFT RESOURCES Design Mark was created, developed, or designed resulting from activities performed on UTHSCSA time.

REQUEST NO. 24

Admit that you did not create or develop the ALLOGRAFT RESOURCES Mark outside the scope of your employment with UTHSCSA.

REQUEST NO. 25

Admit that you did not create, develop, or design the ALLOGRAFT RESOURCES Design Mark outside the scope of your employment with UTHSCSA.

REQUEST NO. 26

Admit that Opposer is the owner of the ALLOGRAFT RESOURCES Design Mark.

REQUEST NO. 27

Admit that Opposer is the owner of the ALLOGRAFT RESOURCES Marks.

REQUEST NO. 28

Admit that Opposer used the ALLOGRAFT RESOURCES Marks before you used Applicant's Marks.

REQUEST NO. 29

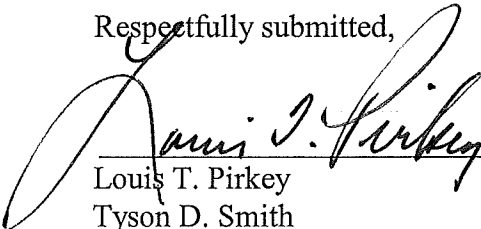
Admit that Applicant's Mark is confusingly similar to the ALLOGRAFT RESOURCES Design Mark.

REQUEST NO. 30

Admit that Applicant's Mark is confusingly similar to the ALLOGRAFT RESOURCES Marks.

Dated: February 21, 2013

Respectfully submitted,



Louis T. Pirkey

Tyson D. Smith

PIRKEY BARBER PLLC

600 Congress Avenue, Suite 2120

Austin, Texas 78701

Telephone: 512-322-5200

Fax: 512-322-5201

ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION TO APPLICANT was served via email, upon agreement of the parties, on February 21, 2013 on Applicant's attorney:

Mark A. Kammer
Kammer Browning PLLC
7700 Broadway
Suite 202
San Antonio, TX 78209
makammer@kammerbrowning.com

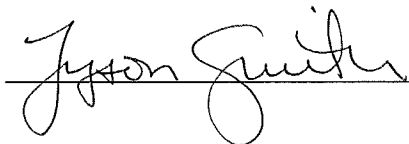


EXHIBIT C

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 85462880

Filing Date: 11/02/2011

NOTE: Data fields with the * are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	YES
MARK INFORMATION	
*MARK	<u>\\TICRS\EXPORT11\IMAGEOUT 11\854\628\85462880\xml1\FTK0002.JPG</u>
*SPECIAL FORM	YES
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	ALLOGRAFT RESOURCES
*COLOR MARK	YES
*DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the term ALLOGRAFT in a dark blue large capital letter font over the term RESOURCES in a dark blue small capital letter font to the right of a design comprising three squares with rounded corners, a first large size dark blue square, a second medium size medium blue square positioned on the lower right over the first square, and a third small size light blue square positioned on the lower right over the second square.
*COLOR(S) CLAIMED (If applicable)	The color(s) blue is/are claimed as a feature of the mark.
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	935 x 306

REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Kelly J. Stutes
*STREET	31 Pfeiffer Road
*CITY	Boerne
*STATE (Required for U.S. applicants)	Texas
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	78006
LEGAL ENTITY INFORMATION	
*TYPE	INDIVIDUAL
* COUNTRY OF CITIZENSHIP	United States
GOODS AND/OR SERVICES AND BASIS INFORMATION	
* INTERNATIONAL CLASS	005
IDENTIFICATION	Human allograft bone and tissue
*FILING BASIS	SECTION 1(b)
ADDITIONAL STATEMENTS SECTION	
*TRANSLATION (if applicable)	
*TRANSLITERATION (if applicable)	
*CLAIMED PRIOR REGISTRATION (if applicable)	
*CONSENT (NAME/LIKENESS) (if applicable)	
*CONCURRENT USE CLAIM (if applicable)	
ATTORNEY INFORMATION	
NAME	Mark A. Kammer
ATTORNEY DOCKET NUMBER	1347.02
FIRM NAME	Kammer Browning PLLC
INTERNAL ADDRESS	Suite 202
STREET	7700 Broadway
CITY	San Antonio

STATE	Texas
COUNTRY	United States
ZIP/POSTAL CODE	78209
PHONE	2108320900
FAX	2108320901
EMAIL ADDRESS	makammer@kammerbrowning.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
OTHER APPOINTED ATTORNEY	Linda W. Browning
CORRESPONDENCE INFORMATION	
*NAME	Mark A. Kammer
FIRM NAME	Kammer Browning PLLC
INTERNAL ADDRESS	Suite 202
*STREET	7700 Broadway
*CITY	San Antonio
*STATE (Required for U.S. applicants)	Texas
*COUNTRY	United States
*ZIP/POSTAL CODE	78209
PHONE	2108320900
FAX	2108320901
*EMAIL ADDRESS	makammer@kammerbrowning.com
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275
SIGNATURE INFORMATION	
* SIGNATURE	/makammer34197/
* SIGNATORY'S NAME	Mark A. Kammer
* SIGNATORY'S POSITION	Attorney of Record, Texas Bar Member

*** DATE SIGNED**

11/02/2011

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 85462880

Filing Date: 11/02/2011

To the Commissioner for Trademarks:

MARK: ALLOGRAFT RESOURCES (stylized and/or with design, see mark)

The literal element of the mark consists of ALLOGRAFT RESOURCES.

The color(s) blue is/are claimed as a feature of the mark. The mark consists of the term ALLOGRAFT in a dark blue large capital letter font over the term RESOURCES in a dark blue small capital letter font to the right of a design comprising three squares with rounded corners, a first large size dark blue square, a second medium size medium blue square positioned on the lower right over the first square, and a third small size light blue square positioned on the lower right over the second square.

The applicant, Kelly J. Stutes, a citizen of United States, having an address of

31 Pfeiffer Road

Boerne, Texas 78006

United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

For specific filing basis information for each item, you must view the display within the Input Table.

International Class 005: Human allograft bone and tissue

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

The applicant's current Attorney Information:

Mark A. Kammer and Linda W. Browning of Kammer Browning PLLC

Suite 202

7700 Broadway

San Antonio, Texas 78209

United States

The attorney docket/reference number is 1347.02.

The docket/reference number is 1347.02.

The applicant's current Correspondence Information:

Mark A. Kammer
Kammer Browning PLLC
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7700 Broadway
San Antonio, Texas 78209
2108320900(phone)
2108320901(fax)
makammer@kammerbrowning.com (authorized)

A fee payment in the amount of \$275 has been submitted with the application, representing payment for 1 class(es).

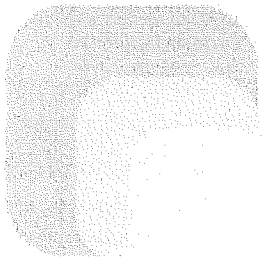
Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /makammer34197/ Date Signed: 11/02/2011
Signatory's Name: Mark A. Kammer
Signatory's Position: Attorney of Record, Texas Bar Member

RAM Sale Number: 4483
RAM Accounting Date: 11/03/2011

Serial Number: 85462880
Internet Transmission Date: Wed Nov 02 18:02:22 EDT 2011
TEAS Stamp: USPTO/FTK-68.90.184.89-20111102180222740
652-85462880-480444f6a908dddbf14cba9c22d
69a0cbbd-CC-4483-20111102173101620383



ALLOGRAFT

RESOURCES

EXHIBIT D

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re Serial No. 85/462,880	§	
Filed: November 2, 2011	§	
Mark: ALLOGRAFT RESOURCES and	§	
Design	§	
Published: August 28, 2012	§	
	§	
Board of Regents,	§	
The University of Texas System,	§	
	§	Opposition No. 91206998
Opposer	§	
	§	
v.	§	
	§	
Kelly Stutes,	§	
	§	
Applicant.	§	

**DECLARATION OF TYSON SMITH IN SUPPORT OF OPPOSER'S
MOTION FOR SUMMARY JUDGMENT**

I, Tyson D. Smith, declare as follows:

1. I am an attorney with the law firm Pirkey Barber PLLC. I have personal knowledge of the matters stated in this declaration and would testify truthfully to them if called upon to do so.

2. On February 21, 2013, I as counsel for Opposer Board of Regents, The University of Texas System ("Opposer")¹ served Opposer's Requests for Admission and other written discovery requests by email on Mark Kammer, counsel for Applicant Kelly Stutes ("Applicant").
See Exhibit 1.

3. Applicant has not responded to Opposer's Requests for Admission and other written discovery requests.

¹ Opposer is a Texas state board established for the purpose of governing The University of Texas System ("UT System"), a system of highly regarded institutions of higher education, including The University of Texas Health Science Center at San Antonio ("UTHSCSA"). UTHSCSA and the UT System are hereinafter collectively referred to as "Opposer."

4. After the March 25, 2013 deadline passed for Applicant to serve Opposer with responses to Opposer's Requests for Admission and other written discovery requests, Louis T. Pirkey and I called and left a voicemail with Mr. Kammer on April 9, 2013, and Mr. Pirkey sent Mr. Kammer an email on April 11, 2013, inquiring about Applicant's intentions with regard to this opposition proceeding. *See* Exhibit 2.

5. Mr. Kammer sent Mr. Pirkey an email on April 23, 2013, stating that he and Applicant would be "putting together a proposal to settle the dispute without the need to go forward further with the Opposition," and promising to have the basic proposed terms of settlement to Opposer's counsel by the end of the day Tuesday, April 30, 2013. *See* Exhibit 3. However, Mr. Kammer has never provided us with these promised proposed terms of settlement, and has not otherwise communicated with us since April 23, 2013.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Austin, Texas on June 10, 2013.


Tyson D. Smith

EXHIBIT 1

Tyson Smith

From: Tyson Smith
Sent: Thursday, February 21, 2013 2:46 PM
To: makammer@kammerbrowning.com
Cc: Louis Pirkey; PB File Copy; Eric Olson
Subject: Service of Discovery Requests (UTTK204)
Attachments: uttk204 admission.pdf; uttk204 prod.pdf; uttk204 interrogs.pdf

Dear Mr. Kammer,

We hereby serve you with Opposer's Interrogatories, Requests for Production, and Requests for Admission for TTAB Opposition No. 91206998. Each of these documents is attached.

Best regards,

Tyson D. Smith

Associate | PirkeyBarber PLLC

600 Congress Avenue, Suite 2120 | Austin, Texas 78701 | USA

512-482-5246 (direct dial) | 512-322-5200 (main) | 512-322-5201 (fax)



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EXHIBIT 2

Tyson Smith

From: Louis Pirkey
Sent: Thursday, April 11, 2013 10:21 AM
To: Mark A. Kammer
Cc: Tyson Smith
Subject: UTHSCSA v. Kelly Stutes

Mark,

Tyson and I called you Tuesday and left a message about this case. I assume you are out of town and will return the call in due course, but if so perhaps you could reply by email to let us know your client's intentions.

As you know, we served written discovery (interrogatories, requests for admission, and document requests) on February 21. We have received no response to that discovery. Under the rules, the requests for admission are now admitted, and those admissions would seem to justify entry of summary judgment for UTHSCSA.

We also note that Mr. Stutes has changed the name of his company to Allo-Advancements, Inc.

All of this suggests to us that Mr. Stutes is not going to continue to defend the case, and not going to begin (or continue) use of the ALLOGRAFT RESOURCES mark. If this is true, we can move for summary judgment but that is a lot of unnecessary work. Accordingly, we suggest that Mr. Stutes simply abandon his application and that will put an end to everyone's efforts in the case and not waste any further resources of the TTAB. Under the PTO rules, this abandonment will be without the consent of the opposer so that a final judgment can be entered and put the matter to rest.

We look forward to hearing from you soon, since we have rapidly approaching deadlines--e.g., April 22 for expert disclosures.

Regards,

Lou

Louis T. Pirkey
Member|Pirkey Barber PLLC
600 Congress Avenue, Suite 2120 |Austin, Texas 78701|USA
512-482-5222 (direct dial)| 512-322-5200 (main)|512-322-5201 (fax) | lpirkey@pirkeybarber.com

EXHIBIT 3

Tyson Smith

From: Mark A. Kammer [makammer@kammerbrowning.com]
Sent: Tuesday, April 23, 2013 3:34 PM
To: Louis Pirkey
Cc: Tyson Smith; 'Linda W. Browning'
Subject: RE: UTHSCSA v. Kelly Stutes

Follow Up Flag: Follow up
Due By: Wednesday, May 01, 2013 7:00 AM
Flag Status: Completed

Lou

I have today spoken with Kelly Stutes regarding the pending Trademark Opposition against the ALLOGRAFT RESOURCES Trademark Application. Over the next few days we will be putting together a proposal to settle the dispute without the need to go forward further with the Opposition. I believe that I can promise to have the basic proposed terms of settlement to you before this time next week (i.e. by the end of the day Tuesday, April 30, 2013). Thanks.

Mark

Mark A. Kammer
Kammer Browning PLLC
7700 Broadway, Suite 202
San Antonio, TX 78209
210.832.0900
210.832.0901 fax

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